

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEVEN DARBY MCDONALD,

Plaintiff,

v.

KENNETH LAUREN et al.,

Defendants.

CASE NO. 3:17-CV-05013-RBL-DWC

ORDER GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS

The District Court has referred this action, filed pursuant to 42 U.S.C. § 1983, to United States Magistrate Judge David W. Christel. The Court has reviewed Plaintiff Steven Darby McDonald's Complaint and concludes Plaintiff has incurred three "strikes" under 28 U.S.C. § 1915(g). However, Plaintiff has shown he is under imminent danger of serious physical injury and therefore the three-strikes rule does not apply. Accordingly, the Court grants Plaintiff's Motion to Proceed *In Forma Pauperis* (IFP).

BACKGROUND

Plaintiff, who is currently incarcerated at Clallam Bay Corrections Center ("CBCC") filed an Application to Proceed *In Forma Pauperis* ("Motion"), Dkt. 1., and a Proposed Civil

1 Rights Complaint, Dkt. 1-1, in this civil rights action on January 8, 2017. Dkt.1. Plaintiff alleges
 2 Defendants have denied him treatment for his liver disease in violation of his First and Eighth
 3 Amendment rights. Dkts. 1, 1-1.

4 DISCUSSION

5 The Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915, governs *in forma pauperis*
 6 (“IFP”) proceedings. Under § 1915(a), a district court may waive the filing fee for civil
 7 complaints by granting IFP status to individuals unable to afford the fee. *Andrews v. Cervantes*,
 8 493 F.3d 1047, 1051 (9th Cir. 2007). “To address concerns that prisoners proceeding IFP were
 9 burdening the federal courts with frivolous lawsuits, the PLRA altered the IFP provisions for
 10 prisoners in an effort to discourage such suits.” *Id.* (citing *Abdul-Akbar v. McKelvie*, 239 F.3d
 11 307, 312 (3rd Cir. 2001) (en banc)). Indigent prisoners still receive IFP status if they meet the
 12 requirements, but § 1915(b) states prisoners proceeding IFP must pay the filing fee when funds
 13 become available in their prison accounts. 28 U.S.C. §1915(b); *Cervantes*, 493 F.3d at 1051.
 14 “Additionally, prisoners who have repeatedly brought unsuccessful suits may entirely be barred
 15 from IFP status under the three-strikes rule.” *Cervantes*, 493 F.3d at 1051-52. The “three-strikes
 16 rule,” contained in §1915(g), states:

17 [i]n no event shall a prisoner bring a civil action under this section if the prisoner
 18 has, on 3 or more prior occasions, while incarcerated or detained in any facility,
 19 brought an action or appeal in a court of the United States that was dismissed on
 20 the grounds that it is frivolous, malicious, or fails to state a claim upon which
 relief may be granted, unless the prisoner is under imminent danger of serious
 physical injury.

21 The Court notes the PLRA’s strike provision does not distinguish between dismissals with
 22 prejudice, dismissals without prejudice, actions dismissed on the merits, or actions dismissed
 23 pursuant to the PLRA’s screening provisions. *O’Neal v. Price*, 531 F.3d 1146, 1154-55 (9th Cir.
 24 2008). When an application is rejected pursuant to the screening provisions of 28 U.S.C. § 1915

1 and the case is dismissed, the dismissal counts as a strike. *Id* at 1155; *see El-Shaddai v. Zamora*,
 2 833 F.3d 1036, 1042 (9th Cir. 2016) (“to constitute a strike, the denial of IFP status must be
 3 based on one of the enumerated grounds in the statute”); *But see Washington v. L.A. Cty.*
 4 *Sheriff’s Dep’t*, 833 F.3d 1048, 1055–58 (9th Cir. 2016) (holding that a dismissal of an action that
 5 includes a claim that both sounds in habeas and seeks injunctive relief does not constitute a
 6 strike). Further, “[d]ismissal of an action and the subsequent dismissal of the appeal as frivolous
 7 amount to two separate strikes.” *Richey v. Fleenor*, 2014 WL 5111588 (W.D. Wash Oct. 10,
 8 2014). *See also Thompson v. Gibson*, 289 F.3d 1218, 1222 (10th Cir.2002); *Moran v. Sondalle*,
 9 218 F.3d 647, 651–52 (7th Cir.2000) (both noting that frivolous appeals count as a strike).

10 **I. Strikes Under 28 U.S.C. 1915(g)**

11 A review of court records from this District shows at least three of the cases Plaintiff filed
 12 while incarcerated were dismissed for failure to state a claim.

13 Plaintiff filed *McDonald v. Kenney, et al.* (Case No. 3:13-CV-5647, W.D. Wash.) while
 14 incarcerated. During the screening process, this case was dismissed with prejudice for failure to
 15 state a claim upon which relief could be granted. As this case was dismissed for failure to state a
 16 claim, *McDonald v. Kenney, et al.* is Plaintiff’s first strike. Plaintiff appealed the dismissal.
 17 *McDonald v. Kenney, et al.*, Case No. 14-35068 (9th Cir.). The Court of Appeals for the Ninth
 18 Circuit denied his motion to proceed IFP because the appeal was frivolous and instructed
 19 Plaintiff to show cause why the court should not summarily affirm the district court’s judgment
 20 after the filing fee was paid. Plaintiff did not pay the filing fee and the case was dismissed for
 21 failure to prosecute. As the motion to proceed IFP was denied as frivolous, Plaintiff’s appeal of
 22 *McDonald v. Kenney, et al.* is his second strike. *See Thomas v. Beutler*, 2012 WL 5464631, *2
 23 (E.D. Cal. Nov. 7, 2012) (counting a dismissal for failure to pay a filing fee a strike when the
 24

1 court of appeals denied the plaintiff's motion to proceed IFP because the appeal was frivolous
 2 and ordered the plaintiff to show cause why the court should not summarily affirm the district
 3 court's judgment upon payment of the filing fee).

4 Plaintiff also filed *McDonald v. Khurshid, et al.* (Case No. 3:04-CV-5736, W.D. Wash.)
 5 while incarcerated. The case was dismissed based on Plaintiff's failure to state a claim for which
 6 relief could be granted and because Plaintiff had abused the legal process, harassed numerous
 7 parties, and engaged in vexatious behavior. *Id.* As this case was dismissed for failure to state a
 8 claim, *McDonald v. Khurshid, et al.* is Plaintiff's third strike.¹

9 While incarcerated Plaintiff brought at least three actions which were frivolous,
 10 malicious, or failed to state a claim; therefore, he is barred from proceeding IFP in this action
 11 unless he can show he is exempt from the three-strikes rule because he is under imminent
 12 danger.

13 II. Imminent Danger Exception

14 The three-strikes rule does not apply if "the prisoner is under imminent danger of serious
 15 physical injury." 28 U.S.C. § 1915(g). Prisoners qualify for the imminent danger exception based
 16 on the alleged conditions at the time the complaint is filed. *Cervantes*, 493 F.3d at 1052. The
 17 imminent danger exception requires a prisoner allege a danger which is "ready to take place" or
 18 "hanging threateningly over one's head." *Id.* at 1056 (internal citations omitted). The Ninth
 19 Circuit has held "requiring a prisoner to 'allege ongoing danger . . . is the most sensible way to
 20

21 ¹ The Court notes Plaintiff appealed *McDonald v. Khurshid, et al.* (Case No. 06-35482, 9th Cir.) and has
 22 also filed numerous other cases while incarcerated. Because the Court has already determined Plaintiff has three-
 23 strikes, the Court finds it is unnecessary to consider these previous cases. *See* Dkt. 1 (Plaintiff states he has filed 12
 24 previous lawsuits). The Court also notes Plaintiff contends he only has two strikes, as "found by my last Judge who
 reviewed my case, Judge Rice." Dkt. 1-1 at 5. Although it is unclear, it appears Plaintiff is referring to *McDonald v.*
Edwards, et al., (Case No. 2:13-CV-00222-SAB, E.D. Wash.). However, Plaintiff's strikes in *McDonald v. Kenney,*
et al. (Case No. 3:13-CV-5647, W.D. Wash.) and *McDonald v. Kenney, et al.*, Case No. 14-35068 (9th Cir.)
 occurred *after* Plaintiff filed *McDonald v. Edwards, et al.*, (Case No. 2:13-CV-00222-SAB, E.D. Wash.).

1 interpret the imminency requirement.” *Id.* (quoting *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th
 2 Cir. 1998)). Additionally, the plaintiff must make specific or credible allegations showing the
 3 threat is real and proximate. *Cervantes*, 493 F.3d at 1053 (citing *Lewis v. Sullivan*, 279 F.3d 526,
 4 531 (7th Cir. 2002); *Kinnell v. Graves*, 265 F.3d 1125, 1128 (10th Cir. 2001)).

5 Plaintiff alleges his constitutional rights are being violated because he is being denied
 6 adequate medical treatment. Dkt. 1-1. Specifically, Plaintiff states he has not been receiving
 7 treatment for his liver disease. *Id.* He contends the lack of treatment will lead to long-term liver
 8 damage and death. *Id.* The Court finds Plaintiff has sufficiently alleged a danger which is “ready
 9 to take place” or “hanging threateningly over his head” as a result of the lack of treatment for his
 10 liver disease. *Cervantes*, 493 F.3d at 1056. Plaintiff has therefore shown the imminent danger
 11 exception applies in this case, and Plaintiff is exempted from the three-strikes rule. *See e.g.*
 12 *Ibrahim v. District of Columbia*, 463 F.3d 3, 6-7 (D.C. Cir. 2006) (lack of adequate treatment for
 13 Hepatitis C constitutes “imminent danger”); *Brown v. Johnson*, 387 F.3d 1344 (11th Cir. 2004)
 14 (same); *McAlphin v. Toney*, 281 F.3d 709 (8th Cir. 2002) (lack of adequate dental facilities when
 15 inmate had dental infection poses risk of imminent danger).

16 CONCLUSION

17 The Court grants Plaintiff’s Motion (Dkt. 1) as Plaintiff has shown imminent danger to
 18 overcome his three strikes. If Defendants dispute the Court’s finding that Plaintiff is in imminent
 19 danger, Defendants may raise the argument in their responsive pleadings and the Court will
 20 revisit the issue.

21 As Plaintiff’s Motion to Proceed IFP is granted, the Court orders as follows:

22 (1) Plaintiff’s declaration indicates he is unable to afford the Court’s filing fee or give
 23 security therefore. As set forth below, an initial partial filing fee will be collected, and Plaintiff is
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1 thereafter required to make monthly payments of 20 percent of the preceding month's income
2 credited to his account until the full amount of the filing fee is satisfied.

3 (2) Pursuant to 28 U.S.C. § 1915, and Plaintiff's approved application to proceed *in*
4 *forma pauperis*, the agency having custody of the above-named Plaintiff is directed to calculate
5 an initial partial filing fee equal to 20 percent of the greater of either: (a) the average monthly
6 deposits to the prisoner's account; or (b) the average monthly balance in the prisoner's account
7 for the 6-month period immediately preceding the date of this Order. The initial partial filing fee
8 should be forwarded to the Clerk of Court as soon as practicable.

9 Subsequently, if the prisoner's account exceeds \$10.00, each month the agency having
10 custody of the prisoner is directed to collect and forward payments equal to 20 percent of the
11 prisoner's preceding month's income credited to the prisoner's account. In the event that the
12 monthly payment would reduce the prisoner's account below \$10.00, the agency should collect
13 and forward only that amount which would reduce the prisoner's account to the \$10.00 level.
14 Please note this \$10.00 limit does not apply to the initial partial filing fee described above.
15 Finally, the monthly payments should be collected and forwarded to the Court until the entire
16 filing fee (\$350.00) for this matter has been paid.

17 (3) The Clerk is directed to send a copy of this Order to Plaintiff, to the financial
18 officer of this Court, and to the agency having custody of Plaintiff.

19 Dated this 24th day of January, 2017.

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22 David W. Christel
23 United States Magistrate Judge
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